MISCELLANY.

Municipal Taxation of Professional Men.—At a meeting of the Finance Committee of the City Council held Thursday, 14th inst., in Richmond, Va., there was considered, among other things, an ordinance to amend and re-ordain the present ordinance requiring a license tax of physicians, dentists, attorneys at law, architects and certain other professional men and fixing the tax at one per cent of their gross receipts for the previous year. The amending ordinance changes the basis from gross to net, but imposes a scale, proportioned to net receipts, ranging from a minimum of twenty dollars to $450 on receipts of $20,000, and $20.00 per $1,000 of receipts in excess of $20,000. Representatives of the several professions, protesting against the imposition of the proposed tax, were given a full and courteous hearing by the Committee, in the course of which certain statements were made and questions asked which have led me to believe that a brief recurrence to the fundamental principles of the subject—municipal taxation of professional men—may not be untimely.

In the first place the sole basis of the city's right to exact such a tax is found in Section 70 of the City Charter, which in its material points is as follows: "The City Council may grant or refuse license and may require taxes to be paid on such licenses to agents of insurance companies, whose principal office is not located in said city; to auctioneers; to public, theatrical, or other performances or shows; to keepers of billiard tables, ten-pin alleys and pistol galleries; to hawkers and peddlers in the city, or persons to sell goods by sample therein; to agents for the sale or renting of real estate; to commission merchants *and all other* BUSINESS *which cannot be reached by the ad valorem system under the preceding section*"—i. e., the property tax on real and personal estate.

"All other business"—i. e., business of like kind, insurance agents, auctioneers, theatrical performances, billiard rooms, ten-pin alleys, hawkers, peddlers, etc.

It will be noted that professional men, as such, are not mentioned. It is a well recognized proposition of the law of municipal corporations that the power to tax a particular subject matter must be affirmatively conferred by the legislature upon the city, town or county. In the case of Ould & Carrington *v.* Richmond, 23 Gratt. 464, decided in 1873, this principle was recognized, the Court saying that while the State Legislature may exercise such powers of government as are not expressly or impliedly prohibited, the converse is the case as to local governments which can exercise only those powers which are expressly or impliedly conferred. The Court held, two of the five judges dissenting, that the power to classify and tax lawyers was impliedly conferred upon the City of Richmond by section 69 of its then Charter, providing that "For the execution of its

powers and duties the city council may raise annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and of the United States."

Ever since that decision, Richmond has been classifying and taxing lawyers and other professional men practicing within her limits but only within the comparatively recent past has the taxation been placed expressly and in terms upon the basis of the income or—what is the same thing—the receipts derived by the practitioner from his practice—in the great majority of cases, substantially the entire income of the professional man. It is believed to be safe to say, without the figures at hand, that the maximum tax under the former system of classification and assessment by the Finance Committee (that approved in Ould *v.* Richmond, *supra*) was one hundred dollars. But with the passage of the gross receipts—one per cent. ordinance of 1920, the tax in the case of each of several professional men rose at once to hundreds of dollars, for the tax was gross—they were not allowed a dollar of deduction for the necessary expenes of earning their living, such as office rent, compensation to assistants and employees and the like, nor a dollar by way of exemption—both of these items being recognized as just deductions in every modern income tax law, state or federal, of which the writer has knowledge.

A protest was made by the professional men of the city in February of this year to the Finance Committee of the Council against the manifest injustice of the ordinance, and there can be no doubt that the Committee perceived and appreciated the merit of the protest. They directed the preparation of an ordinance imposing a tax upon net receipts, but as above stated, and, it is believed inadvertently, the tax was fixed at so high a figure, averaging from one and a half to two per cent., that the last state of these professional men would be, under it, worse than—certainly as bad as—the first. Chairman Grundy stated that it had not been the purpose of the Committee to increase the tax and that the fact that under the proposed amendment some seventeen thousand dollars more would be collected or collectible from professional men by the city than under the existing ordinance was, if it be a fact, altogether unanticipated by the Committee, which wished to correct the injustice of the gross receipts tax and at the same time obtain the same yield as last year from its source of revenue. The Committee took under consideration in executive session reframing of the proposed new ordinance and will doubtless report it out early, the theory of the measure, however, still being that of a graduated tax on net receipts.

It is to this point, that after this long introduction, absolutely necessary, however, to a proper understanding of the subject, that I wish especially to address myself. I submit with entire confidence

that a tax by a city or county of this State upon the receipts, gross or net, of professional men is directly violative of the spirit of an act of the same legislature from which the city derives its sole power to impose any tax whatever. That act is as follows (Acts 1912, p. 795, relating principally to the State income and merchants license tax and providing for the taxation of water, heat, light and power companies):

"Sec. 11. On income, as defined in this schedule, the tax shall be one per centum, *and no city, town or county shall levy or assess any tax on income for municipal or county purposes, and any provision of any city or town charter in conflict with this act is hereby repealed* * * *."

It will thus be seen that the city is forbidden to impose an income tax but that, in the face of the inhibition, it imposes a tax upon professional incomes which it baptizes with the name of "receipts" tax —and gets by with it. I am aware that a test case has resulted in a refusal by the Court of Appeals of relief upon this point, and to that ruling we must, of course, bow. But, as the same Court said in another case, the appeal should be to the sense of justice of the taxing-power and to that body—our municipal legislature—I submit through your columns that its members cannot afford to ignore the spirit of laws of the State—to make a play upon words in a matter of vital importance—and to impose what they know to be nothing else than an income tax, when the laws of the State positively and in terms forbid it.

It is dangerous for a legislature, national, state or municipal, to split hairs, to wink at the violation of organic provisions of law, to exact the letter and laugh at the spirit of the law. Chickens of that brood, especially tax-chickens often come home to roost—which being interpreted means that the citizen is tempted to say, "As you have with eyes wide open, after your attention has been called to it, elected to violate in your legislation the undoubted spirit of a statute of the State, I shall feel not only justified but encouraged to apply the same rule of construction to your statutes, keeping such as I elect only in letter and ignoring their spirit."

The sum and substance of my contention is that there should be no municipal license tax upon professional men, and the Council should be big enough and broad enough to cut down the tree at its roots and recognize that this form of taxation is simply illegal. Certain members of the Council seem to think that because the city charter says that the Council *may* impose a license tax upon professional men, it *must* do so. This is absolutely erroneous. The provision in question is not mandatory, but at most only confers the right to tax in the discretion of the Council. The great commercial States and cities of the country impose no such tax and it is believed that it is largely because attention has never been called seriously and in a timely and appropriate manner to the subject that the City of Rich-

mond has continued to add this burden to the literally innumerable others which its professional men carry.

For, finally, if the professional man is charged on "receipts" tax on his occupation or vocation, why should not every one in the city, having an occupation or vocation which yields a revenue, also pay a "receipts" tax? What real, not specious reason can be given for the difference?

Chicago, evidently doesn't think that there is or should be any difference in taxation of precisely the same tax-subjects. Note the following from the *New York Times* of the 14th inst.:

"Every man or woman in Chicago engaged in a gainful vocation, professional or business, would be required to take out a city license to work and pay the city a fee, under plans of meeting the city deficit which have been worked out at the City Hall. Estimates accompanying the program are that a minimum of $15,000.00, more than enough to make up the city's deficit in revenue, can be raised from the working people of the city by the licensing method.

"Dr. Gottfried Koehler, Chairman of the City Revenue Commission, to-day returned from Sprinfield, the State capital, with the word that he had succeeded in having the enabling legislation, necessary for the new licensing plan, placed before the State Legislature. He reported the prospects for its passage as good.

"Alderman A. J. Carmack, retiring head of the Council Committee on Revenue, declared to-day that the city's revenue difficulties would be ended should the enabling act be passed.

" 'Carpenters, plumbers, stenographers, lawyers, actors, in fact every one engaged in a gainful occupation, professional or business, can be licensed under its terms,' said Alderman Carmack. 'It offers the most extensive powers of revenue raising ever proposed in behalf of a city.' "

That is the logic of the case. If taxation must be equal and uniform, then all persons of substantially the same class should be taxed. If the financial problem is to raise fifty thousand dollars and there are, say, eight hundred professional men with a certain average professional income, and if there are, say, eight hundred other men with the same average income derived from traders or vocations, why should not the fifty thousand dollars be raised from the sixteen hundred rather than the eight hundred? No answer has been thus far suggested that is not either arbitrary or flippant. Yet the question will ultimately, if not presently have to be answered, and it may be the answer will be that of the Chicago suggestion.

Why should we not substitute municipal obedience to the spirit of the law for disobedience? Why should not the city set the example to its citizens to be law-abiding rather than law-evading? Why, finally, should the professional men of Richmond have to pay three heavy income taxes—federal, State and city, the last without exemption of

any kind or amount—while others have to meet only two? If these questions cannot be answered reasonably and substantially, I submit that the case of the professional men has been made out and that the entire system of taxing them upon their recceipts should be repealed and other and lawful subjects of taxation sought in its place.

GEORGE BRYAN, in the Richmond *Times Dispatch*, of April 18, 1921.

Amnesty for Conscientious Objectors.—An effort is just now being made by a small but clamorous minority to procure amnesty for the "conscientious objectors." The reason why such amnesty should not be granted, why this occasion to emphasize the fact that the privileges of citizenship connote the duties of citizenship should not be lost, are too obvious to need recital. An all sufficient answer to the demand for clemency is found in the fact that these "objectors" knew and courted the penalty from which they now seek escape. In the case of Wells *v.* U. S., 257 Fed. 607, there was in evidence a circular issued by an anti-conscription league which contained the following characteristic utterance: "Better be imprisoned than to renounce your freedom of conscience." The "objectors" had their way; they did not renounce the freedom of what they were pleased to call conscience, and they were imprisoned. Now what is all the complaint about? They chose dishonor and its penalties; let them abide by their choice. Shall we in "preparation" for the next conflict make the choice of dishonor easier and cheaper? A man, if he chooses, may make himself a martyr to his convictions, but when those convictions are such as to strike at the very foundations of society he should not expect society to relieve him from his self-sought martyrdom. Cheap notoriety, empty defiance of law, is the very life of most ultra radical agitation. Let it be established now that the notoriety of treason is not cheap; that defiance of a law passed to protect the nation from a foreign foe is not empty, but brings a penalty which no amount of clamor or sophistry can mitigate! The conscious objectors avowedly chose imprisonment rather than military service; let them be imprisoned, agreeably to the imprecations of their own months!—*Law Notes.*

Identity of Husband and Wife.—That Chief Justice Clark of the Supreme Court of North Carolina is not very favorably impressed with the fiction of the legal identity of husband and wife is evidenced by the following taken from his opinion in the case of Crowell *v.* Crowell, 105 S. E. 206, 210:

"The true ground for the exemption of the husband from liability to the wife for his torts, and for his assumption of her property, as already said, was because by the marriage she became his chattel. The fanciful ground assigned for this doctrine, which was far more unjust to married women than that prevailing in other countries under

the civil law or even in the countries under the rule of the Koran, is stated by some of the old writers to be the words in Genesis ii, 23, 24: 'And Adam said, "This is now bone of my bones, and flesh of my flesh,"' adding that a man and wife 'shall be one flesh.' And now, 'speaking for myself and not by commandment' (as St. Paul said on more than one occasion—1 Cor. vii, 6, and 2 Cor. viii, 8), this statement was made by Adam, and not by Deity, and is untrue as a matter of fact; besides Adam was not a lawgiver, but the most culpable lawbreaker known to all the ages. The consequence of his lawbreaking, according to the belief of multitudes, was the greatest and most universal of any man, and, according to orthodox teachings, affects all mankind since, and, if we are to credit the vision of the great English poet, had its immediate effect upon the inanimate world as well:

"'Earth felt the wound; and Nature from her seat,
Sighing through all her works, gave signs of woe that all was lost.'
—Paradise Lost, Bk, ix, line 782.

"It is more than passing strange that in this day of enlightenment, this statement by the greatest malefactor of history, who could frame no laws for any future day and generation, nor keep those made for himself, should be solemnly cited to justify the continuance of age-long injustice and degradation to one-self of the human race. The origin of such treatment was perhaps natural in the economic conditions of a barbarous age when superior physical force made the wife the slave of the husband. But those conditions have passed. All the conditions and customs of life have changed. Many laws have become obsolete, even when not changed by statute and the Constitution, as this has been, and no principle of justice can maintain the proposition in law, or in morals, that a debauchee, as the defendant admits himself to be can marry a virtuous girl, and continuing his round of dissipation, keep up his intercourse with lewd women, contracting, as he admits, venereal disease, communicate it to his wife, as the jury find, subjecting her to humiliation, and ruining her physically for life, and seeking to run off with all his property, abandoning her to utter indigence; yet be exempted from all liability by the assertion that he and his wife are one, and that he being that one, he owes no duty to her of making reparation to her for the gross wrong which he has done her.

"It must be remembered that there is not, and never has been, any statute in England or this state declaring that 'husband and wife are one, and he is that one.' It was an inference drawn by courts in a barbarous age, based on the wife being a chattel and therefore without any right to property or person. It has always been disregarded by courts of equity, and public opinion and the sentiment of the age, as expressed by all laws and constitutional provisions since, have been against it. The anomalous instances of that conception

which still survive are due to courts construing away the changes made by corrective legislation or restricting their application."

The Sense of Smell of a Prohibition Officer.—In United States *v.* Borkowski, 268 Fed. 408, the court said:

"If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Reproduction.—In Comm. *v.* Stauff, 10 Pa. St. 850, Lewis, P. J., said:

"The principle of reproduction stands next in importance to its elder-born correlative, self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates. From the lord of the forest to the monster of the deep—from the subtlety of the serpent to the innocence of the dove—from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain, all nature bows submissively to this primeval law. Even the flowers which perfume the fields with their hues, are but curtains to the nuptial bed."

"O. K."—The letters "O. K." have come to be recognized judicially as an expression of approval of the document to which they are attached. The use of the symbol is deemed to be "in accordance with common usage." (State *v.* Blanchard Constr. Co., 91 Kan. 74.) Thus the abbreviation has been held to be a sufficient approval by the architect of a contractor's bill. (Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Ia. 599.) The same symbol on a bill owed by a third person has even been held to be a guaranty. (Penn Tobacco Co. *v.*

Leman, 109 Ga. 428.) The growth of the term into judicial recognition illustrates interestingly the manner in which usage bcomes incorporated into the law. It is to be regretted that no investigator has yet been able to find an authentic explanation of the origin of the abbrevation. The most common theory is that it is an abbreviation of "oll korrect" and its first use is ascribed by legend to various prominent men who are known to have had little education, Andrew Jackson and John Jacob Astor being among the victims commonly selected. Another common explanation is that in Colonial days rum and tobacco imported from Aux Cayes (pronounced ō kā) were of the best quality and the term Aux Cayes became in the vernacular a synonym of indubitable excellence. The matter is commended to the Carnegie Foundation for investigation, or failing this perhaps some judge of antiquarian turn of mind will favor the profession with an elucidating dictum.—*Law Notes.*

The Common Law.—The following remarks made by C. J Ramage, of Saluda, S. C., before a local bar association, seem worthy of repetition here *ex proprio vigore:* "Gentlemen of the Bar Association, I rise to throw out a few thoughts on our old friend the Common Law. He has been made the butt of many jokes and witticisms—he has been blamed by lawyers when the case was lost; he has been gashed and bled by fool legislatures, but always like old mother nature he comes back at the appointed time, doing business at the same old stand. Some smart fledgling of the law will pass a bill as legislator that is intended to wipe out old man Common Law but when the wise Court comes to pass on the act, it has to call in the old safe pack horse to be again saddled to carry the pitiable little crippled statute along. No English speaking court can live without the Common Law ten minutes. It is the vital breath that fills our legal lungs. It covers up the ugly, gaping places left by the legislature in the sides of statutes with beautiful robes of modesty. It follows us from the cradle to the grave—it protected our fathers and it will protect our grandchildren.

The Common Law is a name that even is involved in mystery. It is generally understood to mean the law common to all of England in the early times. There was a law of Essex, a custom of Kent and another of Sussex in most cases diametrically opposite; but there were certain laws that were common to the realm and for this reason it was called the Common Law. That may be incorrect, but it is the explanation given by that learned commentator, Justice Stephens, in his Books on English Law. It may be said here also that all over Europe the Roman law was common to all and it was for a long time the Common Law so termed in the books, etc. It may have been that the Early Common Law acted on the same principle

and got its name in the same way. But whatever may be its origin, we have it from the early Saxons. It is founded on immemorial usage and it goes back to a time whereof the memory of man runneth not to the contrary. The foundation of the common law is reason —and as Old Lord Coke says when the reason faileth, the law also faileth—reason being the life of the law—when the law fails to be reason, says Coke, then and there it ceases to be the law. Alas! Sir Edward, this does not follow by any manner of means. Sweep over the vast array of law reports in our land and come back and see if you can still make that statement. These may not be the real law but poor mundane mortals have to recognize them as such. The Common Law is also a growing science—it expands and develops every day. In certain states they have what are called Codes that are supposed to contain all the law, but the Common Law has to step in and help construe the Code. Who made the common law? The judges. Who interprets the common law? The judges. Who changes the common law? The judges and sometimes the legislatures. When will the common law cease to function? When Gabriel blows his trump. We may say with Hooker that his seat is in the bosom of God and all things do homage to him. Long may he live and prosper—a guide to the upright, but a delusion and a snare to the unjust and vicious."—*Law Notes.*

Control Over Street-Meetings by Municipal Authorities.—An ordinance of the City of Mt. Vernon, N. Y., prohibited "the congregation of persons in groups or crowds" or "the holding of public meetings upon the public streets of the city" without the mayor's special written permission.[1] In the recent case of Hays *v.* Atwell (N. Y. Sup. Ct. Spec. T. 1920) 64 N. Y. L. J. 440, this ordinance was declared void and unconstitutional. Among the powers of the common council specifically enumerated in the city charter was "to prohibit the gathering or assembling of persons upon the public streets of said city".[2] If the ordinance is within the express power granted the city by the legislature, and is to that extent "expressly authorized and approved by the legislature", the general principle is that its reasonableness and fairness cannot be questioned.[3] More interesting, however, than an analysis of the Mt. Vernon charter to determine the validity of

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[1] City of Mt. Vernon, N. Y., Ordinances, c. xxi, § 21.

[2] City of Mt. Vernon, N. Y., Charter, Sec. 166 (5).

[3] Matter of Stubb *v.* Adamson (1917), 220 N. Y. 459, 116 N. E. 372; see Mader *v.* City of Topeka (Kan. 1920), 189 Pac. 969, 970. "Where, however, the power to legislate is general or implied, and the manner of exercising it not specified, there must be a reasonable use of such power, or the ordinance may be declared invalid by the court." Village of Carthage *v.* Frederick (1890), 122 N. Y. 268, 271, 25 N. E. 480.

the particular ordinance is the broader question raised of the validity of such a measure as a reasonable exercise of the general municipal police power.

That such meetings are the subject of control can hardly be doubted. The highways of the state are under the paramount control of the legislature, whence the municipalities derive their power.[4] In this country, the legislatures usually confer upon the municipal corporations extensive powers over public ways and public places within their limits, sufficient to give them authority to pass necessary and reasonable ordinances for the purpose of keeping the streets free from obstructions and of preventing improper use thereof.[5] For the right of the people to use the streets is limited by the extent and character of that use, and the right of others to use them.[6] Assemblies on the public streets, however, are not unlawful *per se*, but only when constituting a nuisance.[7] Thus an ordinance making it a misdemeanor to "lounge, stand, or loaf" in public places has been held unconstitutional as infringing upon the right of personal liberty and as being unreasonable and oppressive.[8]

The more common type of ordinance, however, avoiding the questions raised by complete prohibition, vests in some city official or group of officials the discretionary power to grant permits for gatherings or processions on the public streets.[9] The courts which have passed upon the propriety of the delegation of this discretion have been dominated by two distinct views of policy. On the one hand, there is a strong line of cases holding that such ordinances are contrary to the spirit of American institutions, unreasonable and void.[10] Some of these courts feel that in a popular government it is wise to encourage united effort to attract public attention and chal-

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[4] See Dillon, *Municipal Corporations* (5th ed. 1911) § 1161.

[5] See Dillon, *loc. cit.*

[6] See Iversion *v.* Dilno (1911), 44 Mont. 270, 275, 119 Pac. 719.

[7] State *v.* Hughes (1875), 72 N. C. 25 (celebration of Emancipation Proclamation): "In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social or moral." See City of Chicago *v.* Trotter (1891), 136 Ill. 430, 432, 26 N. E. 359.

[8] St. Louis *v.* Glover (1907), 210 Mo. 502, 109 S. W. 30.

[9] For a general discussion of ordinances vesting unregulated discretion in officers, see (1915) 15 COLUMBIA LAW REV. 63.

[10] Anderson *v.* Tedford (Fla. 1920), 85 So. 673; State ex rel. Garrabad *v.* Dering (1893), 84 Wis. 585, 54 N. W. 1104 (Salvation Army); City of Chicago *v* Trotter, supra, footnote 7; Rich *v.* City of Naperville (1891), 42 Ill. App. 222 (Salvation Army); Anderson *v.* City of Wellington (1888), 40 Kan. 173, 19 Pac. 719 (Salvation Army); Matter of Frazee (1886), 63 Mich. 396, 30 N. W. 73 (aimed at Salvation Army); In re Gribben (1897), 5 Okla. 379, 47 Pac. 1074 (Salvation Army).

lenged examination and criticism of the associated purpose.[11] But even apart from this, many courts object to an ordinance which lays down no express conditions under which people can move upon the streets and which permits unregulated official discretion which may be used for personal and political purpose. There is also frequent reference to the Fourteenth Amendment.[12] This antipathy is also displayed in decisions on closely related questions of police power, where control of the streets or other places of public resort has been similarly delegated.[13]

On the other hand, the Supreme Court of the United States, in upholding an ordinance forbidding speeches in public parks or grounds without a permit from the mayor, has based the power so to control upon a power of total prohibition.[14] Other courts without assuming this extreme premise find a justification in policy and convenience for the delegation of this discretionary power to forbid or permit use of the streets for purposes other than ordinary traffic.[15] This point of view likewise has been reflected in decisions involving

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[11] See State ex rel Garrabad *v.* Dering, supra, footnote 10, p. 590.

[12] In State ex rel. Garrabad *v.* Dering, Anderson *v.* City of Wellington, and Matter of Frazee, supra, footnote 10, certain organizations were excepted from the provisions of the ordinance, thereby raising the additional objection that it was, on its face, discriminatory.

[13] Matter of Application of Dart (1916), 172 Cal. 47, 155 Pac. 63 (soliciting for private charities; Salvation Army); Little Chute *v.* Van Camp (1908), 136 Wis. 526, 117 N. W. 1012 (keeping open of saloons during certain hours); Los Angeles *v.* Hollywood Cem. Assn. (1899), 124 Cal. 344, 57 Pac. 153 (establishment or enlargement of cemeteries); *cf.* Smith *v.* Hosford (Kan. 1920), 187 Pac. 685 (the erection of garages); State *v.* Tenant (1892), 110 N. C. 609, 14 S. E. 387 (the erection of any buildings); *cf.* Mayor, etc., of Baltimore *v.* Radecke (1878), 49 Md. 217 (the operation of steam engines).

[14] Davis *v.* Massachusetts (1897), 167 U. S. 43, 17 Sup. Ct. 731.

[15] City of Buffalo *v.* Till (1920), 192 App. Div. 99, 182 N. Y. Supp. 418: "no person shall participate in any parade, gathering, assemblage, or demonstration upon any street, square, park * * * which gathering has not been authorized by a written permit from the mayor;" violation by socialist. Fitts *v.* City of Atlanta (1905), 121 Ga. 567, 49 S. E. 793 (socialist); Love *v.* Judge of Recorder's Court (1901), 128 Mich. 545, 87 N. W. 785; Commonwealth *v.* Abrahams (1892), 156 Mass. 57, 30 N. E. 78; City of Bloomington *v.* Richardson (1890), 38 Ill. App. 60, *(semble)*. The court here held that an ordinance prohibiting public meetings without a permit from the mayor did not affect an impromptu gathering around two members of the Salvation Army. The court, in defining a public meeting, stated that it must be open to the general public, that notice thereof must be given in a manner adapted to reach the public in general, and that it must have matter of public interest as its subject or object. The court intimated that if "public meeting" were interpreted to mean any gathering in a public place the ordinance would be unreasonable and void.

ordinances regulating other subject-matters, but analogous in principle. These cases, dealing with the delegation of such discretionary power over the moving of buildings upon public places,[16] the use of the streets by public service corporations,[17] the playing of musical instruments on the streets,[18] and other matters meriting regulation,[19] are frequently referred to as controlling the disposition of cases like the present. While it must be admitted that such analogies, especially in the field of police power, are of doubtful value, these cases at least show that this vesting of discretionary power in municipal officials has met with considerable judicial approval.

It is obvious that a group of individuals should not have unrestrained liberty to obstruct the streets and interfere with the free passage of others, equally entitled to the use of the highways. In fact, the most salutary exercise of the police power is that which seeks to forestall the evil, not merely to mitigate its consequences. To frame an ordinance effectively enumerating the exact circumstances under which such gatherings could be held would be extremely difficult, if not impossible. These ordinances are based on the theory that they do not delegate to certain officials the authority belonging to the governing bodies of the cities, but, in the exercise of that authority by the latter, impose on these officials duties appropriate to their offices.[20] They provide an excellent means of giving the municipal authorities notice that the meetings are to be held, thus affording an opportunity to arrange for proper police supervision. That street meetings may be inimical to the welfare of the community is apparent. To prohibit them entirely would not be desirable. Ordinances of the type in question are therefore adopted as a convenient means of safeguarding public welfare without instituting an absolute prohibition. The power of discretion vested in the city officials is not arbitrary in the strict sense of the term. They are simply made the agents of the law and are bound to exercise that power fairly and for the purpose of promoting public welfare.[21] And when they

[16] Wilson *v.* Eureka City (1899), 173 U. S. 32, 19 Sup. Ct. 317.

[17] West Un. Tel. Co. *v.* Richmond (1912), 224 U. S. 160, 32 Sup. Ct. 449.

[18] Wilkes-Barre *v.* Garabed (1899), 11 Pa. Sup. Ct. 355 (Salvation Army); In re Flaherty (1895), 105 Cal. 558, 38 Pac. 981; Roderick *v.* Whitson (1889), 51 Hun. 620, 4 N. Y. Supp. 112 (Salvation Army).

[19] People ex rel. Economous *v.* Coakley (1920), 110 Misc. 385, 180 N. Y. Supp. 376 (the keeping of poolrooms); People ex rel. Reuther *v.* Sisson (1917), 101 Misc. 429, 167 N. Y. Supp. 134 (the keeping of saloons); Fischer *v.* St. Louis (1904), 194 U. S. 361, 24 Sup. Ct. 673 (the erection of dairies and cowstables); Municipal Paving Co. *v.* Donovan Co. (Tex. Civ. App. 1912), 142 S. W. 644 (the operation of stream rollers upon the streets).

[20] People ex rel. Economous *v.* Coakley, supra, footnote 19.

[21] See Municipal Paving Co. *v.* Donovan Co., supra, footnote 19; Wilkes-Barre *v.* Garabed, supra, footnote 18.

abuse the power by unfairly and arbitrarily refusing to grant permits, they may be compelled to do so by mandamus proceedings and should, as individuals, be held liable for any resultant damages.[22] Where one has been arrested as a result of such misuse of authority, the courts will, in *habeas corpus* proceedings, declare the administration of the ordinance void and order the release of the petitioner.[23] It must be admitted that the exercise of this discretion may frequently be merely the application of social or political prejudgment. And if the court's prejudgment agrees with that of the official, it may not recognize that which, to the petitioner, seems an obvious abuse. Yet, on the whole, these ordinances seem to have advantages sufficient to make them a means reasonably adapted to the solution of the problem of controlling the streets. And they should be deemed, at least a valid exercise of police power.[24]—*Columbia Law Review.*

Barristers and Solicitors—The "Profession" of Law and the "Business" of Law.—Much discussion occurs, from time to time, in America on the question whether the practice of the law has ceased primarily to be a profession and has become a business. The following interesting account of the distinctions between barristers and solicitors in the British practice, taken from "A Philadelphia Lawyer in the London Courts" by Thomas Leaming, Esq., shows very clearly how the matter is handled by the English and why similar criticisms of the English lawyer cannot occur.

An English student's reading is much like that pursued in one of our law schools, the chief difference being that he devotes more time to mastering general principles than to the consideration of reported cases, from which our students are presumed to extract the underlying principle.

Having passed the necessary examinations, the young barrister is finally "called to the Bar," a ceremony which consists in his attending court on a certain day, where, seated with other neophytes, he is addressed by the judge (who has, of course, been posted in ad-

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[22] Remington *v.* Walthall (1910), 82 Kan. 234, 108 Pac. 112; see McQuillan, Municipal Corporations (1913), § 2621.

[23] Yick Wo *v.* Hopkins (1885), 118 U. S. 356, 6 Sup. Ct. 1064. This case seems to be the bulwark of those denying the validity of the type of ordinance in question. It is submitted that while the case contains some very strong *dicta* in point, the decision did not declare the ordinance void, but simply the administration thereof.

[24] The General City Law of New York State, Cons. Laws (1909), c. 26, § 5, forbids all processions and parades on city streets to the exclusion or interruption of other citizens, except the national Guard, the police and fire departments, and the associations of veteran soldiers without prior notice thereof to police authorities who may then designate how much of the street the parade or procession may occupy. *Cf.* Village Law, Cons. Laws (1909) c. 64, § 90 (6).

vance), as follows: "Does Mr. ——— move?" To this the young barrister bashfully assents, though naturally he has no real motion to make. By this brief colloquy he has at once been translated from the student to the barrister.

Solicitors are created by entirely different methods, as there are no Inns, nor similar organizations for students. There is a preliminary examination to determine whether the boy, who desires to become a solicitor, has sucffiient general education. If so, he is apprenticed, for a period of five years, to some practitioner, for which privilege he pays a sum of money, say from 100 to 400 guineas; the amount actually depending upon the solicitor's standing and the affluence of the boy's family.

He begins by copying papers and performing minor services in the public offices, and, at the same time, pursues his legal studies, which have steadily become more arduous. His progress as a law student is ascertained by an intermediate examination, held under the direction of the Solicitors' Incorporated Law Society, and a final one determines whether he has acquired sufficient knowledge of the law to be admitted to practice.

If shown to be qualified, he is admitted by the courts, and is thereafter subject to the discipline of the Society and to that of the courts themselves, usually prompted by the Society. The marked difference, therefore, that distinguishes the solicitor's training from that of the barrister, is the absence of any Inn of Court—with its esprit de corps—as a commanding influence in shaping his development and governing his whole career.

Having been called to the Bar, the question first confronting the young barrister is whether he really intends to practice. He may have read law as an education, meaning to devote himself to literature, to politics, or to some other pursuit, or he may have embraced the profession in deference to the wishes of his family and to fill in the time while awaiting the inheritance of property.

Supposing him, however, to be one of the minority, determined to rise in the profession, he is confronted with formidable obstacles, for he cannot look to his friends to furnish him with briefs. He can never be consulted nor retained by the litigants themselves. The only clients he can ever have are solicitors, whose clients, in turn, are the public. He never goes beyond his dingy chambers in the Inns of Court, where, guarded by his clerk, he either wearily waits for solicitors with briefs and fees, or, more likely still, gives it up and goes fishing, shooting, or hunting.

The early ambition of the young barrister is to become a "devil" to some junior barrister, who always has recourse to such an understudy, and, if the junior is making over £1,000 a year, he continuously

employs the same devil. This term is not applied in a jocular sense, but is the regular and serious appellation of a young barrister, who, in wig and gown, thus serves without compensation and without fame—for his name never appears—often for from five to seven years. The devil studies the case, sees the witnesses, looks up the law, and generally masters all the details, in order to supply the junior with ammunition.

Before the trial the junior has one or more "conferences" with the solicitor, all paid for at so many guineas; occasionally he even sees the party he is to represent, and, more rarely, an important witness or two. The devil is sometimes present, although his existence is, as a rule, decorously concealed from the solicitor.

If the solicitor, or the litigating party, grows nervous, or hears that the other side has employed more distinguished counsel, the solicitor retains a K. C. as leader. Then a "consultation" ensues at the leader's chambers between the leader, junior, solicitor, and, occasionally, the devil.

At the trial, the junior merely "opens the pleadings" by stating in the fewest possible words what the action is about—that it is, perhaps, a seat for breach of promise of marriage between Smith and Jones, or to recover upon an insurance policy for a loss by fire—and then resumes his seat, whereupon the leader, the great K. C., really opens the case, at considerable length and with much more detail and argument than would be good form in an American court. He states his side's contention with particularity, reads documents and correspondence (none of which have to be proved, unless their authenticity is disputed, points which the solicitors have long ago threshed out), and he even indicates the position of the other side, while, at the same time, arguing its fallacy.

Having done this, he leaves it to the junior to call the witnesses; more often he departs from the courtroom to begin another case elsewhere, and returns only to cross-examine an important witness on the other side, or to make the closing speech to the jury. In this way a busy leader may have several trials going on at once. The junior then proceeds to examine the witnesses with the help of an occasional whispered suggestion from the solicitor, who is more than ever isolated by the departure of the leader, and the devil is proud when the junior audibly refers to him for some detail.

If the leader is absent, which frequently happens, notwithstanding his fee has been paid, inasmuch as no case is deferred by reason of counsel's absence, the junior takes his place, while the solicitor grumbles, and more devolves upon the devil.

The devil is in no sense an employee or personal associate of the junior, which might look like partnership, a thing too abhorrent to be

permitted. On the contrary, he often has his own chambers, and may, at any time, be himself retained as a junior, in which event his business takes precedence of his duties as a devil, and he then describes himself as being "on his own."

Having gained some identity, and more or less business "on his own" from the solicitors, a devil gradually begins to shine as a junior, whereupon appears his own satellite, in the person of a younger man as devil, while the junior becomes more and more absorbed in the engrossing, but ever fascinating, activities of regular practice at the Bar.

Whether a barrister shall "apply" for silk is optional with himself, and the distinction is granted by the Lord Chancellor, at his discretion, to a limited, but not numerically defined, number of distinguished barristers.

Whether or not to "take silk," or to become a "leader," is a critical question in the career of any successful common-law or chancery barrister. As a junior, he has acquired a paying practice, as his fee is always two-thirds that of the leader. He has also a comfortable chamber practice in giving opinions, drawing pleadings, and the like; but all this must be abandoned, because the etiquette of the Bar does not permit a K. C. or leader to do a junior's work, and he must thereafter hazard the fitful fancy of the solicitors, when selecting counsel in important causes. Some have taken silk to their sorrow, and many strong men remain juniors all their lives, trying cases with K. C.'s and leaders much younger than themselves.

The English Bar is small, and the business very concentrated; but no statistics are available, for many are called who never practice. By considering the estimates of well-informed judges, barristers, and solicitors, it seems that the legal business of the kingdom is handled by so small a number as from 500 to 800 barristers, although the roll of living men who have been called to the Bar now includes 9,970 names.

The line which separates solicitors from the Bar—the barristers—is difficult for an American to fully appreciate, for in our country it does not exist. The solicitor, or attorney, is a man of law business ——not an advocate. A person contemplating litigation must first go to a solicitor, who guides his conduct by advice in the preliminary stages, or occasionally retains a barrister to give a written opinion upon a concrete question of law.

The solicitor conducts all the negotiations or threats which usually precede a lawsuit, and if compromise is impossible he brings a suit and retains a junior barrister by handing him a brief, which consists of a written narrative of the controversy, with copies of all papers and correspondence—in short, the facts of the case—and which states on

its back the amount of the barrister's fee. The brief is engrossed or typewritten on large-sized paper, with very broad margins for notes, and is folded only once and lengthwise, so as to make a packet fifteen by four inches.

All Englishmen of substance, and all firms and corporations, have their regular solicitors, and the relation is frequently handed down from generation to generation. It is, of course, impossible to have a permanent barrister, because the solicitor selects one from time to time, as the occasion requires, and the client is rarely even consulted in the choice. When an Englishman speaks of his lawyer, he always means his solicitor, and if he wishes to impress his auditor with the seriousness of his legal troubles, he adds that his lawyer has been obliged to take the advice of counsel—perhaps of a K. C.

Hence the solicitor, unlike the barrister, is not ambitious for fame, nor does he worry because he cannot become the Attorney General or a judge; his mind is intent upon the pounds, shillings, and pence of his calling. He may seek business, which the barrister cannot do, and he is something of a banker, often a promoter. Some are men of the highest grade—particularly those employed by big companies or by families with large estates.

The venerable family solicitor of the novel and stage—that custodian of private estates and secrets who appears in all domestic crises, warning the wayward son, comforting the daughter, whose affections are misplaced, and succoring the gambling father—is sufficiently familiar. The worldly experience, which this kindly old gentleman brings from his musty office, is invaluable to his clients.

Instead of being concentrated, like the barristers, in the Inns of Court in London, solicitors are scattered all over the town and throughout the Kingdom itself. Some, especially in the minor towns or poorer quarters of London, are in a small way of business, and must earn rather a precarious living. Others are of a still lower class, and seek business of a more or less disreputable character by devious methods; but all are supposed to have been carefully educated in the law, and are anwserable to their Society and to the courts for questionable practices.

The advantages, however, of the separation of the functions of the solicitor from those of the barrister are distinctly felt in the superior skill, as trial lawyers, developed by the restriction of court practice to the limited membership of the Bar, which would hardly exist if the practice were distributed over the whole field of both branches of the profession. Then, too, the small number of persons composing the Bar enables greater control by the benchers over their professional conduct, and helps to maintain a high standard of ethics and the feeling of esprit de corps.

Moreover, the Bar is not distracted from the science, by contact

with the business, of the law, and it is saved from the contaminating effect of participation in the sordid details of litigation. At the same time, this very condition may be calculated to develop in the average barrister, as distinguished from one of real ability, an attitude approaching dilettanteism.

Solicitors often become barristers, sometimes eminent ones, for they have had an opportunity to study other barristers' methods, and have acquired a knowledge of affairs. Of course, they must first retire as solicitors and enter one of the Inns for study. The late Lord Chief Justice of England began his career as an Irish solicitor.

Solicitors wear no distinctive dress (except a gown when in the county court), but attire themselves in the conventional frock or morning coat and silk hat, which is indispensable for all London business men. They all, however, carry long and shallow leather bags, the shape of folded briefs, which are usually made of polished patent leather.—*The Docket.*